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No. M 15

In the

Supreme Court of the United States

OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal From the Supreme Court of Texas

BRIEF OF APPELLANT

NETH L. LEACHMAN,
1600 Republic National Bank
Building,
Dallas 1, Texas,
Attorney for Appellant.

WARWICK LAW, INC. — 2403 VALDINA STREET — DALLAS — MI 1-3128

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No. 91

In the

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OCTOBER TERM, 1961

REPUBLIC NATIONAL BANK OF DALLAS,
Appellant,

v.

C. H. LANGDEAU, Receiver for
I. C. T. INSURANCE COMPANY,
Appellee.

Appeal From the Supreme Court of Texas

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Texas (R. 365-374) is reported unofficially at 341 S. W. 2d 161. The official report of this opinion has not yet been issued. The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas, (R. 351-363) is reported unofficially at 331 S. W. 2d 349. There is no official report of this opinion. The trial court delivered no opinion.

JURISDICTION

This action was instituted in the 98th District Court of Travis County, Texas. Appellant national bank asserted its right to have the case transferred to Dallas County, Texas, under 12 U. S. C. §94, a federal statute specifying the venue of suits against national banks. The trial court sustained venue in Travis County, Texas, by authority of Sec. 4(f), Article 21.28, Insurance Code of Texas. The Court of Civil Appeals reversed the trial court's judgment and sustained appellant's position that the federal statute required the suit be brought in Dallas County, Texas. The Supreme Court of Texas reversed the Court of Civil Appeals and affirmed the trial court.

Appellant questioned the validity of Sec. 4(f), Article 21.28, Insurance Code of Texas, as applied to suits against national banks, because of its repugnance to the federal statute. In sustaining venue in Travis County, Texas, the Texas Supreme Court decided in favor of the validity of the Texas statute. Under these facts, jurisdiction of this appeal is conferred by 28 U. S. C. § 1257(2).

Because this Honorable Court has postponed the question of jurisdiction to the hearing on the merits, Appellant has included in this brief a section of the Argument dealing with the question of the finality of the state judgment (pp. 9-16, *infra*).

Plaintiff's petition in this case was filed June 26, 1958. His first amended original petition was filed July 21, 1958 (R. 1). Appellant's Plea of Privilege asserting its right to have venue fixed in Dallas County, Texas, was filed Janu-

ary 3, 1959 (R. 325-337). Another defendant in the same action, Mercantile National Bank at Dallas, filed a similar plea (R. 322-324). The two pleas were consolidated for trial and were heard in the 98th District Court of Travis County, Texas, on February 20, 1959; an order overruling both pleas was entered April 2, 1959. Both national banks gave notice of appeal to the court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin, Texas (R. 343-345). All parties to the plea of privilege hearing agreed on April 13, 1959, that the only question involved in the pleas of privilege was whether the federal statutes entitled the defendant national banks to have the case transferred to Dallas County, Texas (R. 345-348).

On December 9, 1959, the Court of Civil Appeals rendered judgment reversing the decision of the trial court in both cases (R. 349-350). Appellee thereupon obtained a writ of error from the Supreme Court of Texas. On November 23, 1960, the Supreme Court of Texas entered judgments in both cases reversing the Court of Civil Appeals and sustaining venue in Travis County (R. 363-364). Both national banks moved for rehearing, and both rehearings were denied on December 21, 1960 (R. 374-375). Appellant herein filed notice of appeal to the United States Supreme Court on March 18, 1961 (R. 377-378); Mercantile National Bank at Dallas filed its notice of appeal to this Court on March 16, 1961 (R. 375-376).

The order of the United States Supreme Court consolidating this appeal with Mercantile National Bank's appeal, allowing two hours for oral argument, and postponing the

question of jurisdiction to the hearing on the merits was entered October 9, 1961 (R. 381).

STATUTES INVOLVED

The text of Section 4(f), Art. 21.28, Insurance Code of Texas, the Texas statute which was held applicable to national banks in this case, is as follows:

> "(f) New Lawsuits. The court of competent jurisdiction of the county in which the delinquency proceedings are pending under this Article shall have venue to hear and determine all action or proceedings instituted after the commencement of deliquency proceedings by or against the insurer or receiver."

Article 21.28 of the Insurance Code of Texas regulates the liquidation, rehabilitation, reorganization, and conservation of insurance companies. It is found in official edition in the *General and Special Laws of Texas, Acts 54th Legislature, Regular Session, 1955, Ch. 267, p. 737.* (Section 4(f) is at p. 742). Sec. 1(b) of that Article defines "delinquency proceeding" as follows (p. 738 in the official edition):

> "(b) 'Delinquency proceeding' means any proceeding commenced in any court of this State against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer."

The federal statute involved is 12 U. S. C. §94. It reads as follows:

> "§94. Venue of suits
>
> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county

> or city in which said association is located having jurisdiction in similar cases."

The wording used in this section was added to §5198, Rev. Stat. (1873), by Ch. 80, §1, Act of February 18, 1875, found at 18 Stat. 320.

QUESTIONS PRESENTED

1. Are the provisions of 12 U. S. C. §94 prescribing venue in actions in state and federal courts against national banks mandatory as to actions in federal courts, and only permissive as to actions brought in state courts?

2. May a state statute relating to venue of suits brought by or against the receiver of an insurance company override the federal law prescribing venue of actions against a national bank?

STATEMENT

ICT Insurance Company, a Texas corporation, was placed in liquidation and a receiver was appointed under the special statutes covering such proceedings. The receiver brought this action in Travis County (Austin) Texas jointly against one hundred forty-four defendants. Included among the defendants were this appellant, Republic National Bank of Dallas, and Mercantile National Bank at Dallas, appellant in No. 90. The receiver alleged all defendants jointly conspired to defraud ICT Insurance Company, its creditors, policyholders and shareholders. Fifteen million dollars in alleged damages are sought against all defendants jointly and severally.

Confronted with this vast, complicated, expensive and unwieldy lawsuit, the two Dallas national banks each sought

under 12 U. S. C. §94 to have the suit transferred as to them only to Dallas County, Texas. To accomplish this they each filed and urged a plea of privilege, the procedure prescribed in Texas to attack improper venue. A separate trial is held, and the parties may even demand a jury. The parties, however, submitted the issue of venue to be heard by the judge of the 98th Judicial District Court of Texas, located in Travis County, the court in which the ICT suit is pending. The court heard both pleas of privilege together and overruled them. Both national banks appealed from the trial court's judgment on the venue issue to the proper intermediate appellate court, the Court of Civil Appeals at Austin.

The Court of Civil Appeals reversed the trial court's judgment and ordered the suit as to each national bank transferred to Dallas County; on further appeal by the receiver to the Supreme Court of Texas, the judgment of the trial court was sustained. Unless the Honorable Court rules now that the federal statute in question requires that the suit as to appellants be transferred to Dallas County for trial, it will be tried in Travis County, Texas. Trial on the merits is being held in abeyance pending decision of the United States Supreme Court.

SUMMARY OF ARGUMENT

As to jurisdiction: The only question involved in this appeal is whether federal law requires a state court to transfer a proceeding against a national bank to the county in which the bank is located. Appellant national bank has asserted this right and it has been denied by the Supreme Court of Texas. The judgment of the Texas Supreme Court is a final

judgment as that term has been defined by this Honorable Court for jurisdictional purposes. The only question involved —that of venue—has been completely disposed of. It will not be considered again by the Texas courts. Since this question is not subject to any further determination in the state courts, this appeal is not subject to many of the objections usually made to Supreme Court review of interlocutory matters. Further, this matter precedes an extended and difficult litigation. If the erroneous decree of the Texas Supreme Court is allowed to stand, error will infect a complex judicial proceeding. It will cause serious inconvenience and expense to the litigants if that error is to be later corrected. In the areas of receivership and accounting the United States Supreme Court will review final state determinations which precede an extended state proceeding. This appellant claims that the same reasoning which allows review in those cases requires review in this one. Further, if this appeal is not heard at this time, appellant will be forced to submit to trial on the merits outside its county and will thus be irreparably deprived of an important federal right. Irreparable injury to appellant can only be prevented by review at this time. Authority sustains the jurisdiction of the United States Supreme Court to review questions at that point in the litigation where a losing party would be irreparably injured if review were unavailing. The Texas courts have had full opportunity to decide this question and have decided it adversely to appellant's claimed federal right. Failure to review at this time will not provide any further opportunity for the Texas courts to decide this question and will only result in irreparable injury to appellant.

As to the Merits: 12 U. S. C. §94, is mandatory when applied to venue of actions against national banks in state courts. It is mandatory on its face. The statute allows a choice between state and federal courts for suits against a national bank, but once that choice is made venue in either system is prescribed and mandatory. A mandatory venue requirement on state courts is the only interpretation of that statute consistent with the federal government's policy that its national banking system shall be uniformly treated in all parts of the country. Likewise, mandatory venue is the only interpretation consistent with another federal policy, that which prevents undue interference by states in the operation of national banks.

Federal decisions, including two from the United States Supreme Court, have unanimously interpreted the statute mandatorily. The better-reasoned state decisions have done likewise. *Casey v. Adams, 102 U. S. 66 (1880)*, holding that the predecessor of 12 U. S. C. §94, is inapplicable to actions "local in their character," does not prevent a mandatory interpretation in this case. The Texas Supreme Court expressly refused to decide this case on the basis of its being a local action. Further, this case is *not* a local action.

The Texas Supreme Court decided this case on erroneous reasoning. 28 U. S. C. §1348, has no effect on 12 U. S. C. §94. §1348 applies only to actions involving national banks in federal courts, and is intended to limit jurisdiction of such actions. State authority cited by the Texas Supreme Court in support of its decision is wrong, and is not binding on this Court. If a mandatory venue requirement in 12

U. S. C. §94, evokes difficulties in its application, that is a matter for Congress or the state legislatures to remedy. It should not be remedied in the courts.

The Texas Supreme Court states that 12 U. S. C. §94 does not deprive the state courts of "jurisdiction" of suits against national banks. Appellant agrees, and points out that this is not a question of state jurisdiction, but of venue. The Texas Supreme Court expressly refuses to follow *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, and distinguishes *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2nd Cir. 1936), cert. den. 298 U. S. 677*. Appellant contends those cases should have governed the Texas Supreme Court's decision. The Texas Supreme Court states that this is a matter "wholly within the domain of state interest," and insulated from federal control. Appellant contends that no matter relating to national banks is insulated from federal control.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT HAS JURISDICTION OF THIS APPEAL BECAUSE THE JUDGMENT OF THE SUPREME COURT OF TEXAS IS FINAL AS TO VENUE, AND BECAUSE FAILURE TO HEAR THIS APPEAL AT THIS TIME WILL RESULT IN APPELLANT'S BEING IRREPARABLY DENIED A RIGHT GRANTED BY FEDERAL LAW.

The question which arises on the issue of jurisdiction is whether the judgment of the Supreme Court of Texas is a final judgment or decree as required by 28 U. S. C. §1257.

All parties agreed below that the only issue involved in the hearing on the pleas of privilege was whether the national banks were entitled under the cited federal statute to have the case transferred to the county in which they were located (R. 347-348). Eventually the case reached the Supreme Court of Texas, and that court held that venue should remain in Travis County (R. 363-365). In so holding it said (R. 365-366, 341 S. W. 2d 162):

> "These venue cases present but a single question of law which may be disposed of in one opinion.
>
> "The question presented is: Does Title 12 U.S.C.A. §94, give a national bank, regardless of the provision of the Texas Venue Statutes, especially the provisions of Article 21.28, Section 4(f) of the Insurance Code, the right to have an action against it tried in the county of its domicile?"

As the case now stands, unless this Honorable Court holds otherwise, the action will proceed to trial in Travis County, Texas, on the merits, subject only to possible review thereafter by the United States Supreme Court on the question whether appellants have the right under the cited Act of Congress to have it tried as to them in Dallas County. So far as all Texas courts are now concerned, the venue question has been decided by a final judgment of the Texas Supreme Court.

Is this judgment of the Supreme Court of Texas "final" as the United States Supreme Court has defined it for jurisdictional purposes? The decisions of this Court in which this issue has been considered have not been arbitrary in requiring that all proceedings be complete before review will be

granted. The Court has instead followed a policy of allowing review before a case is complete in certain situations where cogent reasons dictate that review should be granted. No rigid rules have been set up. Rather the court has looked to various considerations of convenience and necessity to determine when it would review and when it would not. The factors which in the past have permitted Supreme Court review are present in this case.

Some of the factors are attributable to a concept which for want of a better name can be called convenience. The convenience of the Court is one factor. How can the Court keep from being swamped with appeals on interlocutory orders? One way is to refuse those appeals which might better be heard later. Many interlocutory decrees come in this category. A temporary injunction is a good example. In *Montgomery Building and Construction Trades Council v. Ledbetter, 344 U. S. 178 (1952)*, review of an Alabama temporary injunction was sought. The Supreme Court refused, pointing out that a temporary injunction could just as well be converted into a final decree before an appeal is attempted. Even had the Supreme Court reviewed the *Montgomery* case, the decree granting the temporary injunction would have been subject to another determination in the state court when it later determined whether the temporary injunction should be made permanent. It would be a vain act for the United States Supreme Court to review a state interlocutory decree only to have the questions it reviewed become moot by a later and final determination by the state court. Further, the temporary injunction is usually secured quickly,

often before the parties have an opportunity fully to develop all the issues. Evidence considered material in the granting of the temporary injunction might take on a different complexion at the later hearing where all facts are fully developed. There are many instances where a temporary injunction has been granted and a permanent injunction is denied in the same court.

This case is different. The question determined on the venue appeal by the Texas Supreme Court may not be lawfully determined by the Texas courts in a trial on the merits or an appeal therefrom contrary to such Texas Supreme Court decision. The question of venue has been fully developed; no further hearing thereon is now permitted in the Texas courts. The Texas Supreme Court decision on venue is one which is based on law as laid down by that court and is not one subject to change on some fact question.

Convenience of the litigants and the state courts is another important factor which appears to have influenced this Court in granting review. Certain types of decrees contemplate extended proceedings afterward. Such a decree is one after which an extended receivership or accounting is to be carried out. The United States Supreme Court has often granted review in such cases, even though technically the decree reviewed does not complete the proceedings below. One such "receivership" case is *Clark v. Williard, 292 U. S. 112 (1934)*; another was *Radio Station WOW v. Johnson, 326 U. S. 120 (1945)*. The *Johnson* decree contemplated an extended accounting. If the Court refused review on a federal question until all the proceedings were complete, an

extremely lengthy and complex proceeding might thereby be infected with error. In order that the later proceedings might not be based on an incorrect view of applicable federal law the Court has granted review before the accounting or receivership is terminated. This is demonstrated by comparing the "receivership" or "accounting" situation with the temporary injunction. The temporary injunction only contemplates one additional proceeding, and in that the questions presented more than likely are the same as those raised at the original hearing. There is no serious inconvenience to the litigants or the state courts if review is denied. But in an extended receivership or accounting, there might be serious inconvenience if the whole proceeding had to be undertaken a second time because of error at first. This Honorable Court has recognized this and has granted review in such situations.

The trial of this case, as is evidenced by the plaintiff's 345 page complaint will be exhaustive and exhausting, lasting over an extremely long time difficult to estimate. There are one hundred forty-four defendants, and each defendant is alleged to have conspired with each of the other one hundred and forty-three defendants to defraud ICT. This, if true, would require proof of conspiracies running into astronomical figures. If venue here is improper, the error will infect an extremely lengthy and complex state proceeding. Great expense, inconvenience and irreparable injury will result to the state courts and the litigants if the error is not corrected at this time.

Necessity, too, plays its part in the granting of review. There are certain situations in which a question raised before

completion of a case requires an answer before the case continues. In *Republic Natural Gas Company v. State of Oklahoma, 334 U. S. 62, 68 (1948)*, the Court laid down this rule:

> "There have been instances where the court has entertained an appeal of an order that otherwise might be deemed interlocutory *because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.* (Emphasis supplied.)

A case arising from the federal courts, *Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 (1949)*, considered a similar problem. The *Cohen* case was a stockholder's derivative action. At issue was an order requiring the stockholder-plaintiff to give $125,000 as security for costs and attorney's fees to be incurred by the defendant. The cost deposit was a prerequisite to allowing him to prosecute his lawsuit. This Court held the order reviewable in this language (at *337 U. S. 546-547*):

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated * * *. We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

These two cases appear directed at situations very similar to the one in this case. Venue is a separate right, not involved at all in the merits of the case. Nothing relating to the merits

is to be determined in the venue determination, and nothing relating to venue is to be determined in the merits. Venue is independent of the cause itself, separable, and collateral to it. It is a claimed right, finally determined. It is an extremely important right, particularly in a situation such as is present here. The appellant will be irreparably deprived of its federal venue right if review is not granted. Appellant believes that the theories set out in the *Cohen* and *Republic Natural Gas Company* cases apply directly to this case, and require that it be reviewed.

The *Cohen* case, however, continues with a telling distinction:

> "But we do not mean that every order fixing security is subject to appeal. Here it is the *right* to security that presents a serious and unsettled question. If the *right* were admitted or clear and the order involved only an exercise of discretion as to the amount of the security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." (Emphasis supplied.)

This statement makes the rationale of the *Cohen* case somewhat clearer. The order in *Cohen* is reviewable not only because it is separate from the merits and collateral to them, but also because it is important. It involves the existence of a *right*. Were the existence of the right not involved, and were it simply a question involving judicial discretion, review would not have been granted. Likewise, were it an order subject to later determination by the lower court, review would not be allowed. These factors, too, apply to this case. In the case at bar there is a federal *right* being asserted. It is not a question of discretion; it is purely a question of the

existence of the right. Too, there is no later determination of venue possible in this case.

The courts of Texas have spoken with finality on the question of venue and there is no review now to be had except by this appeal. They have spoken in such a way as to deny this appellant its federal venue rights. There is no need to hope that the Texas courts will somehow see their error and remedy the defect if it goes to trial on the merits. The Texas Supreme Court's decision of it is now *res adjudicata*. The Texas courts are now bound by this final decision and will not reconsider it. To wait for a final decision on the merits of this case will be only to deprive appellant effectively and irreparably of a valuable federal right.

In summary, appellant submits this is a final decree as that term has been defined by this Honorable Court for jurisdictional purposes.

II.

THE VENUE OF THIS ACTION AGAINST APPELLANT NATIONAL BANKS LIES IN DALLAS COUNTY, TEXAS, BECAUSE 12 U.S.C. §94 MAKES IT MANDATORY THAT A SUIT SUCH AS THIS BE BROUGHT IN THE COUNTY WHERE THE BANK IS LOCATED WHEN THE BANK CLAIMS SUCH RIGHT. THIS FEDERAL REQUIREMENT OVERRIDES ALL CONTRARY STATE LAWS.

The only question presented on the merits of this appeal is whether the venue requirement of 12 U. S. C. §94 is mandatory when applied to an action such as this one brought in a

state court against a national bank. The Supreme Court of Texas held that the provisions of such act are not mandatory, and that the Texas statute authorizing suits by or against a receiver of an insurance company in liquidation to be brought in Travis County, Texas, is controlling in suits against national banks. Appellant submits the Texas Supreme Court erred in holding that the state statute is controlling and overrides the federal statute.

About one fact there can be no serious dispute: if 12 U. S. C. §94 is mandatory, it will override any state statute contrary to it. The Supreme Court of Texas has recognized this when it held (R. 369, *341 S. W. 2d 164*):

> "If, under federal decisions, United States Revised Statute §5198, 12 U.S.C.A. §94, is applicable here, then all state statutes in conflict therewith must yield."

Also (R. 373, *341 S. W. 2d 166*):

> "Of course, a state by legislative enactment cannot deprive a federal instrumentality of one of its constitutional or statutory rights, nor can a federal right be defeated under the name of state practice."

The quotations show that there is no serious challenge to the proposition that the federal government has the *power* to make its venue requirements mandatory on state courts where national banks are involved. It is now to be determined whether 12 U. S. C. §94 is an *exercise* of that power. The appellant submits that it is, and that the mandatory nature of 12 U. S. C. §94 is revealed in many ways. It is revealed in the wording of the statute itself, in its history, and in a study of the cases which have spoken on this subject, principally those of the United States Supreme Court and

other federal courts. It is revealed most clearly by applying to this situation the federal government's historic principle that national banks will be uniformly treated wherever they may be. Finally, an examination of the reasoning on which the Texas Supreme Court's opinion is based shows clearly that such court failed to take these factors into account in construing this statute. It is for these reasons that appellant seeks a reversal of the Texas Supreme Court's decision.

Appellant will first present in some detail the various reasons which require that 12 U.S.C. §94 be construed as mandatory on state courts. It then proposes to show that the Texas Supreme Court erroneously failed to respect and follow that reasoning.

A. THE VENUE REQUIREMENT OF 12 U.S.C. §94 IS MANDATORY WHEN APPLIED TO STATE COURTS.

(1) It is mandatory on its face.

12 U.S.C. §94 reads as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Assuming a litigant wants to sue a national bank, this section gives him two choices. If federal court jurisdiction exists, he *may* sue in a federal court. Which federal court? The statute sets it out clearly: the one "* * * held within

the district in which such association may be established." Or, he *may* sue in a state court. Which one? This, too, is set out in the statute: the one having jurisdiction in similar cases "* * * in the county or city in which said association is located." This plain language cannot be arbitrarily disregarded.

The purpose of 12 U. S. C. §94 has been much discussed, especially when it is considered in conjunction with certain other sections of the United States Code, particularly §24 (4) of Title 12, and §1348 of Title 28. Whether or not §94 also encompasses jurisdiction, its application to venue is crystal clear. Were it not designed to cover venue the words relating to venue would not have been included. Each system of courts—federal or state—has its own rules for venue in ordinary cases. Had Congress intended that a suit against a national bank be treated as an ordinary case, it would simply have provided jurisdiction in either federal or state courts and said nothing about venue. Instead Congress chose to speak of venue. It said, in effect, that a suit against a national bank is not an ordinary suit, but is to be governed by special rules. It is not the place of the courts to say that Congress intended the words in §94 relating to venue to have no meaning. In fact, the reverse is true. It is an accepted principle of statutory construction that a court in construing a statute should, if possible, give effect to every clause and word in it. *United States v. Menasche, 348 U. S. 528 (1955); Inhabitants of Montclair v. Ramsdell, 107 U. S. 147 (1883).* It is possible to give effect to every clause and word of 12 U. S. C. §94, but only if the section is construed as establishing mandatory venue.

This problem was considered previously in *Cadle v. Tracy, 4 Fed. Cas. 967, No. 2279 (Cir. Ct. S. D. N. Y. 1873)*, a case which construed a predecessor of the present 12 U. S. C. §94. The predecessor statute was §57 of the National Banking Act of 1864, 13 Stat. 116; it is quoted in full on p. 42 of this brief and for all practical purposes was the same as the current §94. The National Banking Act of 1864 also contained §8 [presently in 12 U. S. C. §24(4)] which authorized national banks to sue and be sued "* * * in any court of law and equity." It was apparently contended that the word "may" in the venue statute was permissive when applied to state courts, and that venue was governed by state law because of §8. This contention was answered in the following language (at *4 Fed. Cas. 972)*:

> "It is true, that the word used is 'may', and that that word is used, in the section, in reference to both federal courts and state courts. But, that word cannot, in regard to state courts, be regarded as permissive or enabling, because under the 8th section, a state court in the county or city in which the association is located having jurisdiction in similar cases, might have jurisdiction of a suit against the association, if the state authority so provided; and, therefore, the provision of the 57th section, in regard to state courts, if merely permissive or enabling, is surplusage, and contains no more than was already contained in the 8th section. * * * But there is a clear indication that the jurisdiction of such suits by state courts was intended to be confined to the state courts specified. If this is not so, there was no need of saying anything about state courts, in the 57th section of the Act of 1864. The state courts specified in that section are already covered by the 8th section of the same Act. It cannot be supposed that Congress did not intend that the provision in the 57th section in regard to state

courts should have some meaning, and it can have none unless as a restriction on the general provision in regard to jurisdiction found in the 8th section."

It was then held that the New York state courts had no "jurisdiction" of a suit against an Alabama national bank. The predecessor of 12 U. S. C., §94, was construed as mandatory on state courts.

It has been urged that this statute is permissive as to venue because the word "may" is used rather than "must." There is a simple answer to that contention. It is true "may" implies a choice; plaintiff may choose between suing a national bank in a federal court or a state court. If he chooses a federal court the venue is set out in the statute; there is nothing permissive about it. The same is true if he chooses a state court.

If 12 U. S. C. §94 is read logically and sensibly, it is clear that venue in both federal and state courts is mandatory. To construe it permissive as to state venue is completely to disregard eleven words in the statute. If a court is to respect the will of Congress, it cannot disregard those eleven words.

(2) A mandatory interpretation accords with the national government's policy that national banks will be uniformly treated in all parts of the country, and allowed to carry out their functions without hindrance by the states.

It is vital to the welfare of the United States that there be a strong national banking system. To the end of establishing such a system, Congress has historically followed

the principle that national banks must be uniformly treated in all sections of the country. A rule has also developed which prevents a state from unreasonably interfering in the operation of the national banking system. These principles antedate the present National Banking Act by a number of years. In the leading case of *McCullogh v. Maryland, 4 Wheat 316 (U. S. Sup. Ct. 1819)*, Chief Justice Marshall struck down an effort by a state to tax the Second Bank of the United States. To the same effect was *Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. Sup. Ct. 1824)*. The same principles of federal supremacy continued after the present system of national banks was established in 1863. The question of state interference with the national banking system arose again in *Farmers & Mechanics' National Bank v. Dearing, 91 U. S. 29 (1875)*. There a national bank brought suit on a note in a New York state court. The defendant contended the note was usurious. As the National Banking Act then existed it allowed the maximum rate of interest chargeable by a New York national bank to be determined by reference to New York law. New York law also provided that the penalty for usury was forfeiture of the total obligation, while the National Banking Act's penalty for usury was forfeiture of only the interest. It was contended that since New York law determined the maximum rate of interest it also determined the penalty. The Supreme Court held the proper determination of the penalty was under federal [redacted] olding it said (at *91 U. S. 33-34*):

> "The national banks organized under the Act are instruments designed to be used to aid the government in

> the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.
>
> "Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the Constitutional Laws enacted by Congress to carry into execution the powers vested in the General Government'."

The *Dearing* case provides a good example of the manner in which the federal government has chosen to administer its national banking system. The rate of interest was specifically left to the determination of the respective states. With the proviso that no state could establish an interest rate which discriminated against national banks, it was apparently felt that leaving this matter to the states could not unduly burden national banks. On the other hand, the *penalty* remained under federal control. The New York rule forfeiting the whole obligation would have unduly burdened national banks in New York and would have destroyed uniformity in the banking system.

There are other decisions of this Court which reflect these principles. Referring to the National Banking Act of

1864, there is the following language from *Cook County National Bank v. United States, 107 U. S. 445, 448 (1883)*:

> "We consider that Act as constituting by itself a complete system for the establishment and government of national banks, * * *."

In *Van Reed v. People's National Bank, 198 U. S. 554, 555 (1905)*, the following was said:

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law making power of the government may permit."

These references to the "complete system" set up for the operation of national banks, their national character as quasi-public institutions, and the inhibition on state interference indicate that a state's ability to enforce its laws on a national bank is limited. Even a state's public policy, otherwise salutary, must yield in face of the federal government's determination to have a uniform and unhindered national banking system. In *Davis v. Elmira Savings Bank, 161 U. S. 275 (1896)*, it was contended that the public policy of New York ought to prevent the application of federal law in distributing the assets of an insolvent national bank. This Court held, however, that it preferred a policy in favor of all the people of the United States, which would assure

uniformity of treatment for national banks and stimulate confidence in them.

How do these principles affect the application of 12 U. S. C. §94 to venue in state courts? This appellant, of course, does not concede that the words of this section permit any interpretation other than a mandatory one. If they do, an interpretation should be made which is most in accord with the broad principles here set out. What interpretation will do that? It is the one which will assure uniformity of treatment for national banks in all parts of the country, and a minimum of interference in their operation by the states. Congress, it is true, has seen fit to allow the states some authority over national banks. As one manifestation of this, state courts have been allowed to entertain suits involving them. Subject to the supervision of the United States Supreme Court, no state can unreasonably interfere with or harrass the national banking system simply by possessing jurisdiction of such suits. This grant to the states, however, stops short of allowing them complete freedom in its exercise. If state courts are to hear suits against national banks, they must be heard in the national bank's home city or county.

Why is it reasonable so to limit this grant to the states? Uniformity of treatment is one answer. Venue rules vary greatly from state to state. In Texas it is probably safe to say that under some Texas venue rule a national bank in Dallas or Houston could be sued in any of the state's 254 counties, some of which would be hundreds of miles away

from the bank's only place of business. El Paso, Texas, is 809 highway miles from Texarkana, Texas; there are national banks in both cities. It could seriously hinder the operations of any national bank if several of its principal executive officers and many of its records were required periodically to be dispatched to distant counties in order to defend litigation. In other states such varied venue possibilities might or might not exist; in branch-banking states, the existence of branches would do much to alleviate that problem. If state venue were followed, the result would be a hodge-podge with national banks in one state subject to considerably more difficulty than national banks in another. To apply mandatory federal venue is to replace that hodge-podge with uniformity.

Likewise, this case is a good example of just the sort of harrassment Congress was attempting to avoid. Republic National Bank of Dallas is sued along with 143 other defendants in a claimed multi-million dollar conspiracy suit brought at a point almost 200 miles from the bank's only office. The tria. could conceivably last many months. The suit must be defended; its magnitude—even if the claim is unfounded—requires that the bank give it the same careful attention as if it were meritorious.

If the national government's policy toward the national banking system is to be maintained, the venue provision of 12 U. S. C. §94 must be construed as mandatory on suits in state courts.

(3) A mandatory interpretation is supported by decisions of this court and other federal courts, as well as the better-reasoned decisions from state courts.

This Court has twice addressed itself to the problem of whether the venue provisions of 12 U. S. C. §94 (or its predecessors) are mandatory on state courts. The earlier case was *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*. There a North Carolina national bank was sued in the state court of Cleveland County, a county other than the one in which it was located. The bank did not question venue at the trial in Cleveland County, but waited until appeal to claim that right. This Court held that the bank had waived its right to claim venue in its home county by not raising it at the trial level in the following language (at *132 U. S. 144-145)*:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. Bank v. Pahquioque Bank, 14 Wall. 383, 394; Crocker v. Bank, 101 Mass. 240. But, without indulging in conjecture as to the object of the exemption in question, *it is sufficient that it was granted by Congress, and if it had been claimed by the defendant, when appearing in the superior court of Cleveland County, must have been recognized.*" (Emphasis supplied.)

The case was decided on the basis of waiver, but in so deciding the Supreme Court added what it felt was the proper

interpretation of 12 U. S. C. §94's predecessor. (The predecessor, §5198, Rev. Stat. (1873), contained for these purposes the same wording as the present one.) The Court held that if the bank had claimed its right to be sued in its own county, that right *must* have been recognized. There has been no retreat from this position.

In fact, it was reiterated in a later case, *Cope v. Anderson, 331 U. S. 461 (1947)*. This case did not directly involve the problem at hand. It arose from a suit to assess the shareholders of an insolvent Kentucky national bank. The question was whether the suit was barred by the Ohio statute of limitations. Application of Ohio's statute of limitations depended on where the cause of action arose. This Court held that the cause of action arose in Kentucky, and in so holding made the following statement (*331 U. S. 467*):

> "Many provisions of federal law make national banks, in important aspects peculiarly local institutions. See 12 U.S.C. §§30, 33, 34a, 36, 51, 67, 71, 12 U.S.C.A. §§30, 33, 34a, 36, 51 62, 72. For jurisdictional purposes a national bank is a 'citizen' of the state in which it is established or located, 28 U.S.C. §41 (16), 28 U.S.C.A. §41 (16), *and in that district alone can it be sued.* 12 U.S.C. §94, 12 U.S.C.A. §94." (Emphasis supplied.)

Once again the Court expressed itself on this issue in a way consistent with a mandatory interpretation.

Lower federal courts have also addressed themselves to the venue aspects of 12 U.S.C. §94. Of course when a case arises in the federal courts state venue is not directly involved. What is involved is the interpretation of the statute. If it is mandatory as to federal courts there is nothing in its lan-

guage to indicate it is other than mandatory on state courts. The federal courts have consistently held the venue provisions of 12 U. S. C. §94 mandatory, and this interpretation of the statute's intent controls the interpretation of the state venue portion as well.

Most recent of these federal cases is *Buffum v. Chase National Bank, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952).* There the plaintiff filed suit against a New York national bank in a federal district court in Illinois. The court held that—absent waiver—suit against the national bank could be maintained only in the place of its establishment. It also held that no later enactment had by implication repealed §94. The United States Court of Appeals affirmed an order dismissing for want of proper venue.

To much the same effect was *Leonardi v. Chase National Bank, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677.* Unlike *Buffum, Leonardi* concerned which of two federal judicial districts within the same state was proper. The defendant national bank had its main office in the Southern District of New York; it was sued in federal court in the Eastern District of that state. Although the bank had a branch in the Eastern District it was nevertheless held that proper venue lay only in the Southern District.

International Refugee Organization v. Bank of America, 86 F. Supp. 884 (S.D. N.Y. 1949), was also a suit against an out-of-state national bank in a federal district court. The suit was dismissed because of improper venue; *Cope v. Anderson, supra,* was cited as authority. *Schmidt v. Tobin, 15 F. Supp. 35 (D.C. Nev. 1935),* involved a similar question.

The court, citing—among others—*First National Bank of Charlotte v. Morgan, supra,* and *Cadle v. Tracy, supra,* held that a national bank may not be sued without its consent outside the state of its domicile.

In addition to this federal authority the courts of several states have construed 12 U. S. C. §94 (or its predecessors) as mandatory. Earliest was Massachusetts. *Crocker v. Marine National Bank, 101 Mass. 240, 3 Am. Rep. 336 (1869),* involved a suit against a New York national bank in a Massachusetts state court. The statute in question was §57 of the National Banking Act of 1864, 13 Stat. 116 (quoted in full on p. 42 *infra*). In deciding venue was improper in Massachusetts, the court held (at *101 Mass. 242, 3 Am. Rep. 338*):

> "This section manifests the intention of Congress that each of these associations should be sued, either in the federal or in the state courts only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases."

In 1929 the courts of New York began to rule that the venue requirement of §94 was mandatory in that state. Before that time *Cooke v. State National Bank, 50 Barb. 339 (Sup. Ct. N. Y. 1867), affirmed 52 N. Y. 96, 11 Am. Rep. 667 (1873); Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508 (1880),* and *Talmadge v. Third National Bank, 91 N. Y. 531 (1883),* had held that suits against national banks in New York state courts were not governed by

federal venue rules. *Raiola v. Los Angeles First National Trust & Savings Bank, 233 N. Y. S. 301, 133 Misc. 630 (City Ct. N. Y. 1929)*, reversed the former position. Since that time other New York cases have followed *Raiola* and held §94 mandatory. They are: *Crofoot v. Giannini, 196 Misc. 213, 92 N. Y. S. 2d 191 (Sup. Ct. N. Y. 1949); Robinowitz v. Kaiser-Frazer Corp., 198 Mis. 312, 96 N. Y. S. 2d 638 (Sup. Ct. N. Y. 1950)*; and *Chaffee v. Glens Falls National Bank & Trust Co., 204 Misc. 181, 123 N. Y. S. 2d 635 (Sup. Ct. N. Y. 1953), affirmed 283 App. Div. 694, 128 N. Y. S. 2d 539 (1954), appeal to Ct. App. denied, 283 App. Div. 793, 129 N. Y. S. 2d 237 (1954)*. The *Raiola, Giannini and Glens Falls* cases cite *First National Bank of Charlotte v. Morgan, supra*, for their holding. The *Glens Falls* case presented a somewhat peculiar situation. The court construed 12 U. S. C. §94 as mandatory but refused to change venue to the national bank's county because the New York Supreme Court (in which the action was brought) is a court of statewide jurisdiction and is theoretically "in" every county in the state. This reasoning may be applicable in New York but not in Texas, where the courts of Travis County and particularly the district court in which this suit is filed have no jurisdiction in any other county.

In 1935 the North Dakota Supreme Court applied 12 U. S. C. §94 as mandatory, and refused to entertain suit in a North Dakota state court against a Minnesota national bank. It cited the *Morgan* case, *supra*, as well as the *Cadle* and *Raiola* cases, *supra*. *Burns v. Northwestern National Bank of Minneapolis, 65 N. D. 473, 260 N. W. 253 (1935)*.

Recently California, too, changed its position. An early case had refused to sustain a California national bank's contention that §5198, Rev. Stat. (1873), a predecessor of §94, required that a suit brought against a national bank outside its county be transferred to the bank's county. *Fresno National Bank v. Superior Court, San Joaquin County, 83 Cal. 491, 24 Pac. 157 (1890).* In 1952, however, *Monarch Wine Co. v. Butte, 249 P. 2d 291 (Dist. Ct. App. Cal.),* considered the problem again and determined that §94 was mandatory, based on the *Morgan* decision of this Court the federal decisions cited above, and the authority from Massachusetts, New York, and North Dakota.

In 1958 the Supreme Court of Washington construed §94 as mandatory, following *Monarch Wine Co. v. Butte, supra. Zarbell v. Bank of America, 52 Wash. 2d 549, 327 P. 2d 436 (1958).*

In examining these authorities, however, there are two further points which should be considered. First is the contention that a number of these cases are distinguishable because they involve litigation against an out-of-state national bank. It is true that of the cases cited above, only the two California cases, the *Glens Falls* case and *First National Bank of Charlotte v. Morgan,* involve an in-state national bank. (*Cope v. Anderson* did not squarely present the issue.) The rest involve out-of-state banks. This, however, is not necessarily a valid distinction. There are two bases upon which litigation against an out-of-state national bank could be terminated: because the bank is not doing business in the state where suit is brought, or because of the federal venue

rule. In evaluating authority, we must look to the basis upon which each decision was made. In each of the cited cases it was made, not because of the national bank's failure to engage in sufficient activity in the state of suit, but because of the federal venue rule. In *Bank of America v. Whitney Central National Bank, 261 U. S. 171 (1923)*, on the other hand, it was held that a New York federal court had no jurisdiction because the defendant national bank, located in Louisiana, was not doing business in New York. This disposed of the case on jurisdictional grounds, and the United States Supreme Court expressly refused to consider venue. If a case such as *Whitney Central* is disposed of because of the national bank's failure to carry on business activity within the state of suit, Appellant agrees that there has been no ruling on the applicability of §94. If, however, a court in deciding such a case determines it solely on the basis of the federal *venue* rule, that case is good authority for interpreting §94. The cited cases interpreting §94 cannot be distinguished on that basis.

Next we will consider the applicability of *Casey v. Adams, 102 U. S. 66 (1880)*. This Court held there that the predecessor of §94 (Sec. 5198, Rev. Stat. 1873), applied only to transitory actions, not to such actions as are by law local in their character. It continued that local actions are "in the nature of suits *in rem*, and are to be prosecuted where the things on which they are founded is situated." There are two good reasons why the doctrine of *Casey v. Adams* does not apply in this case. First, the Supreme Court of Texas ex-

pressly refused to decide this case on that basis, saying instead (R. 369, *341 S. W. 2d 164*):

> "It is unnecessary to our decision to determine whether this particular action is local or transitory in nature."

Second, this is not a local action. A local action is one that must be brought in one particular court—and that court only—because of the geographic proximity of a particular thing involved in it. Texas has defined a "local action" as one which would only have arisen in one place, distinct from a transitory action which might have arisen anywhere. *Pegram v. Owens, 64 Tex. 475 (1885); Parker v. Mather, 59 S. W. 2d 961 (Tex. Civ. App. 1933, err. ref.); Employers' Casualty Co. v. Ponton, 41 S. W. 2d 147, 149 (Tex. Civ. App. 1931, no writ history.)* In *Texas & Pacific Railway Co. v. Gay, 86 Tex. 571, 589, 26 S. W. 599, 605 (1894)*, the following definition was given by the Texas Supreme Court:

> "'* * * when the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, * * *."

How can it be said that an action involving 144 defendants and initiated by a petition requiring 322 pages of printed record arose only in one place? This action arose all over the map if the plaintiff's allegations are to be accepted. Nor is this a statutory local action. Section 4(f), Article 28, V. A. T. S. Insurance Code, the Texas statute in issue in this case, simply permits suits brought by the receiver of an insolvent insurance company to be brought in the court where delinquency proceedings are pending. Under Section 1(b),

Article 21.28 of the same Insurance Code, a delinquency proceeding may be "commenced in *any* court *of this State* * * *." There is no requirement that a delinquency proceeding be brought in Travis County nor that it be maintained in geographic proximity to a *res* or thing; only that new lawsuits be brought where the delinquency proceeding is pending.

B. THE DECISION OF THE SUPREME COURT OF TEXAS WAS BASED ON IMPROPER REASONING AND AUTHORITIES.

The Supreme Court of Texas has apparently advanced five reasons for its holding that 12 U. S. C. §94 is inapplicable. Most important is its contention that 28 U. S. C. §1348 requires a permissive interpretation of §94. It also cites a number of cases which allegedly sustain a permissive interpretation. It says great difficulty would be created if §94 were mandatorily applied, and authorities holding contrary are criticized. Finally it states that this is a matter wholly within state interest and thus insulated from federal control. When carefully analyzed, each of these bases is shown to be incorrect.

(1) 28 U.S.C. §1348 has no effect on 12 U.S.C. §94.

As one of the major bases for its decision, the Texas Supreme Court concluded that 28 U. S. C. §1348 affected 12 U. S. C. §94 in such a way as to require the venue directive in §94 to be permissively construed as to state courts. 28 U. S. C. §1348 reads as follows:

> "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by

direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under Chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such Chapter.

"All national banking associations, shall, for the purposes of all other actions by or against them, be deemed citizens of the states in which they are respectively located."

Apparently the Texas Supreme Court read the last sentence in §1348 as making a Texas national bank, for purposes of actions by or against it, a "citizen" of Texas and thus subject to the procedural laws of that state as a "citizen" would be. This broad reading of this language is not justified by the words themselves, by the history of the statute, or by the cases interpreting the statute. The real purpose of the words in question was to make a national bank a "citizen" of the state in which it was located so it could resort to federal courts on grounds of diversity of citizenship, and to take away from national banks their previously existing right to utilize the federal courts solely because of a national bank's being a federal instrumentality. No broader meaning was intended.

§1348 has had a rather complex history. When the National Banking Act of 1863 was adopted, jurisdiction of suits by and against national banks was limited to federal courts. *National Banking Act of 1863*, §59, *12 Stat. 681*. When the National Banking Act of 1864 replaced the 1863 act, jurisdiction of such suits was given to state *and* federal courts. *National Banking Act of 1864*, §57, *13 Stat. 116-*

117. The 1864 Act used the language which later became 12 U. S. C. §94 (See discussion at p. 42, *infra*). When the federal statutes were revised in 1873, jurisdiction of such suits was again given only to federal courts. *Secs. 563(15), 629 (10), and 629(11), Rev. Stat. (1873).* In 1875, state courts were given jurisdiction of such suits again, apparently concurrently with jurisdiction in federal courts. *Act of February 18, 1875, Ch. 80, 18 Stat. 320.*

Under that state of the law national banks asserted the right to be sued in federal courts solely because they were federal instrumentalities. In 1882 Congress attempted to put a stop to this. The Act of July 12, 1882, Ch. 290, Sec. 4, 22 Stat. 163, read as follows:

> "Section 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to National Banking Associations, and it shall continue to be in all respects the identical association as it was before the extension of its period of succession; *provided, however, that the jurisdiction for suits hereinafter brought by or against any association established under any law providing for National Banking Associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such National Banking Associations may be doing business when such suits may be begun;* and all laws and parts of laws in the United States inconsistent with this provision be, and the same are hereby, repealed." (Emphasis supplied.)

In *Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778 (1887)*, the United States Supreme Court construed this 1882 legislation as an attempt to keep national banks from using the federal courts solely on the basis of their being federal instrumentalities. That the intent of this statute was so unclear as to require a Supreme Court case for its interpretation, however, probably prompted a new effort to do the same thing in more explicit language. This new effort was *Sec. 4, Chapter 373, Act of March 3, 1887, 24 Stat. 554-555;* it was re-enacted as *Sec. 4, Chapter 866, Act of August 13, 1888, 25 Stat. 436.* It read as follows:

> "That all national banking associations established under the laws of the United States, shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The purpose of the 1882 and the 1888 acts together was discussed in *Continental National Bank v. Buford, 191 U.S. 119, 124-125 (1903):*

> "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon

> the ground that they were created by and exercised their powers under, Acts of Congress. *No other purpose can be imputed to Congress than to effect that result.*" (Emphasis supplied.)

In 1911, the portion reading "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state" was deleted. *Section 24, Act of March 3, 1911, 36 Stat. 1091-1093.* This clause had probably been inserted to clarify the previously discussed purpose. Unfortunately the clause was ambiguous; if read carefully it would actually *deprive* a national bank of access to federal courts on diversity grounds. This problem was discussed in *Petri v. Commercial National Bank of Chicago, 142 U. S. 644 (1892)*, and the Supreme Court indicated it would overlook the strict construction of this language in order to carry out the apparent intent of the statute. The existence of this ambiguity was probably the reason this language was deleted. The deleted language was not necessary to accomplish the purpose of the statute. After the 1911 deletion the 1888 statute eventually found its way into 28 U. S. C. Sec. 1348, and was enacted into positive law as it presently stands by Chapter 646, Act of June 25, 1948, 62 Stat. 993.

At the same time that Congress enacted the present 28 U. S. C. Section 1348 into positive law, it repealed the proviso in the 1882 Statute. *Section 39, Chapter 646, Act of June 25, 1948, 62 Stat. 992, 994.* The repealed portion is that which is *italicized* in the quotation from the statute on page 37, *supra.*

The United States Supreme Court has, in effect, construed the statutory provision which is now Section 1348 as one which only limits jurisdiction of national banks in federal courts. The Texas Supreme Court has erroneously construed it much more broadly; it would make national banks "citizens" of their states and thus subject to state procedural rules. This interpretation by the Texas Supreme Court would have the effect of treating national banks and state banks identically for the purpose of judicial proceedings. Yet the Texas Supreme Court used the *repeal* of the 1882 statute to reinforce its broad interpretation of Section 1348. The repealed portion of the 1882 statute, on its face, provides that state and national banks will be treated identically for purposes of jurisdiction. To repeal the 1882 statute certainly cannot be used to reinforce a contention that federal policy is to treat state and national banks identically. Instead it reinforces the opposite conclusion: that federal policy is to treat national banks differently from state banks.

Indeed, a 1924 Wisconsin case, *Brust v. Bank, 184 Wisc. 15, 198 N. W. 749*, used the *existence* of the 1882 Act to support a contention that the predecessor of 12 U. S. C. §94 was permissive as to state venue. Now the Texas Supreme Court uses the *repeal* of the same act to support the same proposition. The two cannot be consistent.

A number of other cases have held that §1348 (or its predecessors) has no effect on §94. They are: *Buffum v. Chase National Bank of New York, 192 F. 2d 58 (7 Cir. 1951), cert. den. 342 U. S. 944 (1952); International Refugee Organization v. Bank of America, 86 F. Supp. 884*

(S. D. N. Y. 1949); Rabinowitz v. Kaiser-Frazer Corp., 198 Misc. 312, 96 N. Y. S. 2d 638 (Sup. Ct. N. Y. 1950).

It is clear that the Texas Supreme Court erred in holding that 28 U. S. C. §1348 allowed Texas venue rules to apply in this case.

(2) Authority given to support the Texas Supreme Court's opinion is incorrect.

The Supreme Court of Texas cited several state cases in support of its decision. None of these state cases should override the federal authority cited in this brief. Even so, none of the cases cited presents a persuasive argument for interpreting §94 permissively. Three of the cases cited—*Cooke v. State National Bank, 50 Barb. 339 (Sup. Ct. N. Y. 1867), affirmed 52 N. Y. 96, 11 Am. Rep. 667 (1873); Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508 (1880);* and *Talmadge v. Third National Bank, 91 N. Y. 531 (1883)*—are old New York cases which have been overruled by *Raiola v. Los Angeles First National Trust & Savings Bank, 133 Misc. 630, 233 N. Y. S. 301 (City Ct. N. Y. 1929),* and cases following it. (See pp. 30-31 *supra.*) The effect of *Fresno Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157 (1890),* was discussed in *Monarch Wine Co. v. Butte, 249 P. 2d 291, 293-294 (Cal. App. 1952),* where it was decided that the Fresno case did not militate against a mandatory construction of §94. (See p. 32 *supra.*) Thus four of the twelve cases cited by the Texas Supreme Court have had doubt cast upon them by later authority in their own states. Another case cited by the Texas Supreme Court—*Levitan v. Houghton*

National Bank, 174 Mich. 566, 140 N. W. 1019 (1933)— relied on Chapter 290, Sec. 4, Act of July 12, 1882, 22 Stat. 162, to sustain its contention that the predecessor of §94 was permissive. The statute relied on was repealed in 1948. (See pp. 36-41 *supra*). *Guerra v. Lemburg, 22 S. W. 2d 336 (Tex. Civ. App. 1929, err. dis.)*, relied principally on the argument that §94 applied only to usury actions, a discredited theory that arose from a curious situation no longer existing.

The wording of the present Section 94 first appeared as Section 57 of the National Banking Act of 1864, 13 Stat. 116:

> "Section 57. That suits, actions, and proceedings, against any association under this act, may be had in the circuit, district or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases; provided, however, that all proceedings to enjoin the comptroller under the act shall be had in a circuit, district, or territorial court of the United States, held within the district in which the association is located."

When the federal statutes were revised in 1873, jurisdiction of all suits involving national banks was given only to federal courts. *Section 563 (15), Section 629 (10), and Section 629 (11), Rev. Stat. (1873).* In 1875, however, state courts were again given jurisdiction of suits against national banks, apparently concurrently with that of the federal courts. This was done in a somewhat circuitous way. By *Chapter 80, Act of February 18, 1875, 18 Stat. 320*, the wording of *Section 57* of the *National Banking Act of 1864*,

supra, (except for the proviso) was added to *Section 5198, Rev. Stat. (1873)*. This resulted in a curious juxtaposition, for Section 5198 had previously related only to actions to recover penalties for usury. When the federal statutes were codified in 1926, the usury portion of former Section 5198 was separated from the portion relating to jurisdiction and venue. The jurisdiction and venue portion became 12 U. S. C. §94. Except for elimination of the word "suits", 12 U. S. C. §94 contains the same wording as did §57 of the National Banking Act of 1864. During the time this wording was joined with the usury provision, however, there appeared some decisions such as *Guerra* holding that the jurisdiction-and-venue requirements now in §94 applied only to actions for penalties for usury. The codification of 1926 eliminated that argument. *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2 Cir. 1936), cert. den. 298 U. S. 677.*

Cassatt v. Bank, 9 N. J. Misc. Rep. 222, 153 Atl. 877 (Sup. Ct. N. J. 1931), relies principally on the theory that the court in which the action was brought was a court of state-wide original jurisdiction and "in" every county in the state. Cf. *Chaffee v. Glens Falls National Bank & Trust Co., supra*, page 31. Whatever validity this theory may have in New Jersey or New York, it has no application to Texas. *Montpelier First National Bank v. Hubbard, 49 Vt. 1, 21 Am. Rep. 97 (1876)*, is not in point at all. That case concerned whether a national bank could sue in a state court as *plaintiff*, under the wording "Actions and proceedings *against* * * *" national banks found in a predecessor of 12 U. S. C.

§94. Venue was not involved. *Lee v. Citizens' Bank, 5 Ohio Dec. Rep. 21, 1 Am. Rep. 385, 2 Cin. Sup. Ct. Rep. 298, 13 Ohio Dec. Rep. 913 (1872)*, indicated that federal statutes required mandatory venue but was decided on the theory of waiver. There has been no waiver in the instant case. *Holmes v. National Bank, 18 S. C. 31, 44 Am. Rep. 558 (1882)*, held that on the basis of conflicting authority it could not withdraw state court jurisdiction from suits against national banks by "implication." We contend this is a statute clear on its face, and there is no real conflict of authority. *Continental National Bank v. Folsom, 78 Ga. 449, 3 S. E. 269 (1887)*, relied on *Casey v. Adams* and said that §94's predecessor applied only to usury. *Curlee v. National Bank, 187 N. C. 119, 121 S. E. 194 (1924)*, followed *Cooke v. State National Bank, supra*, in holding that §94's predecessor was permissive. The *Cooke* case, of course, has been overruled. Thus it is seen that *none* of the state authority cited in the Texas opinion establishes a persuasive theory for holding 12 U. S. C. §94 permissive as to venue.

(3) Difficulty in applying 12 U.S.C. §94 is no reason to hold it inapplicable.

Another reason given by the Texas Supreme Court for its decision is that to apply 12 U. S. C. §94 mandatorily would lead to difficulties in suits involving national banks from several counties. (R. 371; *341 S. W. 2d 165.*) It cites *County of Okeechobee v. Florida National Bank, 112 Fla. 309, 150 So. 124 (1933)*. The *Okeechobee* case did not involve this problem, but was decided on the basis that the out-of-county national bank had waived its venue rights.

The statute was, however, construed as mandatory. If problems will arise if 12 U. S. C. §94 is given a mandatory interpretation, correction should be accomplished by Congress, not the courts.

(4) Other bases of the Texas Supreme Court's Opinion.

Another reason the Texas Supreme Court gave for its holding was that 12 U. S. C. §94 did not deprive the state courts of *jurisdiction* of an action of a national bank located and doing business in another state, or in a county or city other than that in which an action is brought. No one has contended that the state courts are without jurisdiction here; jurisdiction and venue are two different things. What this appellant does contend is that 12 U. S. C. §94 gives jurisdiction to the state courts and also sets out the venue rule they must follow. Since they did not follow that venue rule, the Texas decision should be reversed. The Texas court then admits that *First National Bank of Charlotte v. Morgan, 132 U. S. 141 (1889)*, "* * * definitely stated that the federal venue statute, * * * was mandatory rather than permissive." (R. 371-372; *341 S. W. 2d 165.)* It refuses, however, to follow the *Morgan* case because it says it is *dicta* and not binding on the Texas court. This appellant contends that the language in *Morgan* is not *dictum*, but if it is it is based on sound reason and sets out the policy which the United States Supreme Court has determined to follow. It is the *policy* of the United States Supreme Court that the state courts are bound to follow, and this policy should be followed where it is found. The *Morgan* decision should have been followed. It should be followed in this case. Again, the Texas Supreme Court contends that *Leonardi v. Chase National Bank of the City of New York, 81 F. 2d 19 (2 Cir.*

1936), cert. den. 298 U. S. 677, was intended to apply only to actions against national banks in *federal* courts. *Leonardi* indicated that 12 U. S. C. §94 is mandatory and there is nothing in the language of the opinion to indicate that the mandatory interpretation was not intended to apply to the whole statute.

Finally, the Texas Supreme Court held, without any supporting authority, that this suit is a matter "wholly within the domain of state interest, and is, therefore, insulated from federal judicial review as well as the application of federal venue statutes." (R. 369, *341 S. W. 2d 164.)* We submit that under the authorities hereinabove discussed this conclusion is self-evidently incorrect.

CONCLUSION

For the reasons stated, the appellant respectively submits that the judgment of the Supreme Court of Texas should be reversed, that the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas reversing the decision of the trial court should be affirmed, and that venue in this case as to the national banks in question should be transferred to Dallas County.

Respectfully submitted,

NETH L. LEACHMAN,
1600 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Appellant, Republic National Bank of Dallas.

PROOF OF SERVICE

I, Neth L. Leachman, attorney for Republic National Bank of Dallas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of November, 1961, I served copies of the foregoing brief of appellant on appellee by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorneys of record for appellee, as follows:

To Cecil C. Rotsch, Esq.,
P. O. Box 13,
Austin, Texas.

To Quentin Keith, Esq.,
Keith, Mehaffy, McNicholas & Weber,
Kaufman Trust Building,
Beaumont, Texas.

To W. E. Cureton, Esq.,
Cureton & Lanham,
401 Professional Building,
Waco, Texas.

None of the persons on whom service is to be made resides five hundred miles or more from me.

NETH L. LEACHMAN,
1600 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Appellant, Republic National Bank of Dallas.